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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

**No. 834**

THE STATE OF NEW JERSEY and the PRINCIPAL KEEPER OF THE STATE PRISON AT TRENTON, NEW JERSEY,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA, *ex rel.* ANTHONY RUSSO and UNITED STATES OF AMERICA, *ex rel.* FRANK BISIGNANO,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA, *ex rel.* ANTHONY RUSSO and UNITED STATES OF AMERICA, *ex rel.* FRANK BISIGNANO,

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The State of New Jersey prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on May 20, 1965.

### Opinions Below

The opinions of the United States Court of Appeals for the Third Circuit, printed in the Appendix herein, *infra*, pp. 1a to 30a, are reported in 351 F. 2d 429 (3 Cir. 1965).

## Jurisdiction

The United States Court of Appeals for the Third Circuit entered judgment in this case on May 20, 1965. The State of New Jersey filed a petition for rehearing, which petition was denied on October 13, 1965.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

## Questions Presented

1. Does the rule of *Escobedo* v. *Illinois* require the suppression of free and voluntary confessions by state prisoners who have neither requested nor been refused counsel, solely because the investigating authorities did not advise the suspects of their right to remain silent, of the fact that anything they said might be used in evidence or of their right to consult with counsel?

2. Is the decision in *Escobedo* v. *Illinois* to be accorded retroactive operation so as to allow collateral attacks on judgments of conviction which became final before that decision was rendered?

## Constitutional Provision Involved

The relevant constitutional provision involved in the instant case is the Sixth Amendment of the United States Constitution which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

## Statement of the Case

On March 15, 1961, at approximately 11 P.M., Joseph Hagel was shot and killed by Anthony Russo in Hahn's Tavern in Newark, New Jersey, in the course of an attempted robbery by Anthony Russo, Frank Bisignano and Robert LaPierre. At the time, Russo, armed with a .32 caliber automatic and Bisignano, carrying a hunting knife in his pocket (5T. 1551),* had entered the tavern while LaPierre remained in the back seat of a Chevrolet with the motor running. All three fled the scene abandoning the car. Russo and LaPierre were apprenhended the same evening within blocks of the tavern. Bisignano was apprehended the next morning at the entrance to Russo's apartment.

Preparations had been made for a holdup early in the evening of March 15, 1961. Sometime around 7 P.M. the three defendants, together with one Chris Vespucci and a Rocky DiMuzio, set out in Bisignano's truck (1T. 103 to 106) to obtain a car because "they needed it for a getaway car" (1T. 110). The car, a cream and dark rust color 1958 Chevrolet Delray (1T. 141) with the ignition unlocked (1T. 143) was stolen from a parking lot at 70 South Munn Avenue in East Orange, diagonally across from East Orange General Hospital.

The gap in the State's proofs, accounting for the time spent by the defendants between the stealing of the car and the arrival in the area of Hahn's Tavern, was caused by a ruling of the trial court on the testimony of one Sarah Schimmel (1T. 218).

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* This and similar references are to the transcript of the trial, indicating both volume and page.

With regard to the happenings at Hahn's Tavern, the State's proofs indicated that Joseph Hagel entered Hahn's Tavern at about 10 minutes to 11 (1T. 238) and that he sat at a bar stool. At 11 P.M. Hahn changed channels on the television set (1T. 245) and "well, while we were watching or listening to the late news the door opened" (1T. 246).

> "Q. Two men walked in, then what? A. Well, one walked in about 10 feet inside the door and stood there and the other one continued up near to where we were sitting." (1T. 246)

Both of them had dark hats, dark glasses and dark trench coats (1T. 249). Both men (early in the State's case Bisignano was referred to as "E" and Russo was referred to as "F" by the witnesses) had their hands in their pockets and Russo announced "Don't anybody move, this is a stick-up, give us the money" (1T. 252 to 253). At the time Russo "pulled his hand out of his trench coat pocket and held a gun" (1T. 253). The tavern owner, Mr. Hahn, said (1T. 254), "well, I didn't observe anything but the flash from the gun and the noise and Mr. Hagel getting off the stool and firing back and the two of them firing at one another." Hahn further testified under questioning by the Court (1T. 256):

> "Q. Can you tell us the direction from which the first flash came? A. Yes.
>
> Q. From where? A. From F's gun.
>
> The Court: From F's gun. All right."

Bisignano had taken a position as described with his hands in his trench coat pocket (1T. 250 to 251) and Joseph Hahn said, "When I was told this was a stickup he made one step toward the bar" (1T. 204).

Following the shooting Hagel lay on the floor mortally wounded. He was promptly removed from the scene but died of two bullet wounds, one "in the front left side of the abdomen" and the second "in the lower left abdomen" (1T. 82 to 84). At approximately 11:20 P.M. Hagel was received at Martland Medical Center; "he was dead on arrival" (1T. 77).

Bisignano ran toward the door "approximately after the second shot" (1T. 311). Russo, during the shooting, ran for the door, fell down, lost his hat and glasses, arose and continued his escape (1T. 258). When Russo left the tavern he was wounded. LaPierre, who had started out of the automobile upon hearing the shots, came to his rescue and assisted him through a series of back alleys for several blocks to the area of Montclair Avenue. In the attempt to make good the escape, Russo and LaPierre were forced to abandon some money which LaPierre was holding, as well as Russo's trench coat.

LaPierre who admittedly had recommended Hahn's Tavern as "a good place to stick up" was apprehended as he approached Montclair Avenue while Russo hid in a driveway. It is significant that as soon as LaPierre was apprehended "as soon as I grabbed him by the arm, he said 'I didn't rob him'" (2T. 581). Bisignano, unhampered as were the other two defendants, made his way to Broadway where he took a bus back to Russo's apartment. He then took Russo's girl friend, Veronica Szematowicz, to his home in Lodi where he, with his wife and Veronica, attempted to construct an alibi. Prior to developing his alibi, Bisignano told Veronica substantially all of the events surrounding the killing of Joseph Hagel. Bisignano was apprehended with Veronica as they returned to Russo's apartment the next morning. At trial, each defendant had a defense. LaPierre suggested that he was never part of the conspiracy

to rob Hahn's Tavern, that if he was, he abandoned the enterprise (DLb12-32) and that at best he was guilty of a violation of N.J.S. 2A:85-2, a statute dealing with assisting an escape.

Bisignano indicated abandonment as his defense. He admitted he and Russo cased the tavern but decided not to hit it. They went in for a beer and Bisignano ran out when gun play was indicated. He never heard Russo say, "This is a stickup" (5T. 1556).

Russo was never going to rob Hahn's Tavern. He was going to "case" the place for "Rocky" but significantly he rejected it because it was too crowded that night (5T. 1594; 5T. 1640). Russo also contended he was either insane or drunk or under the influence of narcotics or all three.

Because defendants argued that the written statements made by them were improperly admitted into evidence, the factual circumstances surrounding the taking of those statements and also the taking of LaPierre's statement deserve scrutiny.

A.

The defendant LaPierre was questioned at the Newark Police Headquarters on the morning of March 16, 1961, at which time he apparently gave an oral statement. The oral statement was commenced about 12:15 or 12:30 (3T. 796) at which time LaPierre indicated to Sgt. Buerle the details of the holdup (3T. 800). As the result of the information received from LaPierre, Bisignano was questioned (3T. 803) and then LaPierre was taken out with a photographer. At that time photographs (S-68 A through J) were taken and physical evidence was recovered including some money and Russo's raincoat (3T. 810). LaPierre was then taken

back to Police Headquarters where a written statement, (S-72), was taken from him from approximately 3:15 to approximately 6:45 P.M. (3T. 823). No objection was made with regard to the voluntariness of LaPierre's statement and there was no objection by his attorney with respect to the voluntariness of any admissions made by LaPierre (3T. 797, 818, 820, 821). Bisignano was being questioned at police headquarters at the same time as was LaPierre. Each knew the other was present (3T. 969).

**B.**

Bisignano, aged 22 and then on parole under a conviction for grand larceny, was apprehended at about 11:15 A.M. (3T. 871) and was brought to police headquarters for questioning. He was questioned starting at about one-quarter to twelve (3T. 845). His answers were apparently checked with those given by LaPierre and Veronica Szematowicz (3T. 845). The officers then had a conversation with LaPierre (3T. 846) and then Lt. Kinney, Detectives Leonardis, Scruese and Sgt. Buerle questioned Bisignano again (3T. 847). Lt. Kinney indicates that Bisignano was questioned from 3:15 P.M. to sometime between 6 and 6:45 P.M. during which time "we had some sandwiches and coke, cigarettes, I think" (3T. 885). Lt. Kinney further said that Bisignano was questioned from 12 to 1:30; that Bisignano was not questioned from 1:30 to 3:15 and that a statement was taken from him from 3:15 to 6:30 (3T. 887 through 889).

March 16, 1961, was a Thursday. The record indicates that after Bisignano was questioned he was not brought before a magistrate until the following Monday (3T. 983). There is no dispute, however, that the statement was taken from Bisignano on the afternoon of March 16 before 7:00 P.M. and that following the taking of the statement, Bisig-

nano was allowed free access to visitors. In his appeal to the Supreme Court of New Jersey Bisignano confined his complaint of mistreatment to the time between his being brought into headquarters and the time he was taken out to Kinney's office at about 3:15 P.M. (3T. 976, 952).

Here, admittedly, there was no prolonged questioning; admissions were made by Bisignano by 6:00 P.M., and indeed Bisignano himself indicated that he was taken out of the interrogation room at about 3:00 P.M. (3T. 952).

The officers specifically denied any mistreatment of Bisignano during the questioning (3T. 922, 929, 903). Bisignano and LaPierre read their statements at the same time, and there was no suggestion by LaPierre that Bisignano was mistreated then or at any time in his presence. LaPierre's total evidence on brutality consisted in his hearing Bisignano shout, "What am I doing here?" (3T. 937) and noticing a bump on his head (3T. 938) and black and blue marks on his forehead (3T. 940).

Bisignano admits that he was taken to court the following Monday morning (3T. 983) and was brought before Newark Magistrate Castellano (3T. 984). His photograph was taken immediately after he signed the statement introduced into evidence by the State (S-74), and his photograph was taken again by the Sheriff's office when he was received in the Newark Street Jail the following Monday. That photograph was also introduced by the State (S-75; 3T. 1031). On the day following his interrogation he was visited by his brother-in-law (3T. 1002), his mother, his father and his wife. Each testified that he touched a different part of Bisignano's body and elicited complaints (3T. 1004, 1008, 1011).

Although he claimed he was beaten by 10 or 11 officers, the photographs in evidence do not support the contention

and the medical form filled out at Newark Street Jail (3T. 1032) is devoid of any complaint. Raymond C. Apgar, a jail trustee, indicated that Bisignano complained of headaches "and he couldn't sleep so good" (3T. 1028).

Bisignano admitted he complained of athlete's foot (3T. 985) and "above my left eye", and admitted he was treated for the athlete's foot (3T. 989).

C.

Defendant Russo, aged 21 and awaiting sentence for armed robbery, was taken to the Martland Medical Center in the early morning hours of March 16 because of the bullet lodged in his right arm. The bullet, which had been fired by Hagel during the holdup attempt, was not removed until Russo gave permission on March 17, and then it was extracted by operation by Dr. Donato (3T. 706). The operation was a simple one (3T. 708) and Russo was released from the hospital on March 23 (3T. 706). He was taken from the hospital to Newark Police Headquarters where he gave a statement because, (according to Russo), Sgt. Buerle said, "if I didn't sign the statement and make a statement he was going to take the typewriter and smash it on my arm" (4T. 1192, 1193).

Russo also indicated that a police officer hit him on March 16 as he entered the hospital (4T. 1186) and that prior to the operation on the 17th Scurese tortured his arm, by "poking at it" (4T. 1190).

Nurse Scott testified that on March 21 she examined the arm and noticed welts (4T. 1207), but there is no testimony from anyone to suggest that the welts were caused by other than the bandage and the tape. At the hearing in the District Court Nurse Scott indicated that the welts first appeared some 10 or 15 minutes following an injection of

medication she administered pursuant to doctor's orders (A53a).* Dr. Donato indicated that the welts may very well have been an allergic reaction, although he could not rule out trauma as the cause (A48a). When Dr. Donato testified for the State as to the operation, the defendant Russo reserved the right to call him as his witness (3T. 709), but Dr. Donato was never recalled. Nurse Hall also described a facial injury which two hours after hospital admission "was more visible than when he was admitted" (4T. 1206). The same nurses noted that police officers came 37 minutes *after* the ice pack was applied to Russo's face. The detectives who questioned Russo immediately following his hospital admission denied touching him (4T. 1177).

In addition, testimony given at the District Court hearing by Nurse Jean Weiner, in some respects favorable to Russo, was found by Judge Augelli to be less than impressive, and in the main hearsay, which in material respects was denied by other witnesses (A73a). Nothing of substance was added to that already before the State tribunals (A76a).

Sgt. Buerle for the State, testified that he had a conversation with Russo on the 17th (4T. 1138) and on the 24th (4T. 1141). Detective Scurese indicated that he called at the hospital with Detective Leonardis right after the bullet was removed and that Russo gave an oral statement at that time (4T. 1222 to 4T. 1224). The detectives involved specifically denied any threat or violence. The written statement given on the 24th was admitted into evidence as (S-81) (4T. 1234). At the time of the written statement, Russo had been in police headquarters only a short time.

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* This and similar references are to defendant Russo's Appendix filed as part of the certified record in the court below.

The police officers who questioned him denied any mistreatment. The cross-examination of Sgt. Buerle (4T. 1149 to 1151) indicates that the statement was commenced about 1:00 P.M. and finished at 4:05 P.M.; that the defendant was cooperative with the police.

> "Q. He would be happy to give a statement? A. Well, he didn't say he would be happy but he said he would give us a statement."

Russo was in headquarters less than five hours (4T. 1151). Prior to that he was in the hospital where he was regularly attended by doctors and nurses.

To put all of the testimony regarding Russo's confession in context, it clearly appears that Russo would admit nothing while he felt that he was frustrating detection by retaining the bullet from Officer Hagel's gun in his arm. When the bullet was removed, Russo felt that he had given the police the evidence they needed and the details were of little consequence. He thereafter voluntarily made a statement and re-enacted the crime for the police. It is significant that the defendant makes no claim of brutality concerning the re-enactment (S-84) of the crime on March 25, 1961 (4T. 1257).

An appeal by LaPierre and defendants Bisignano and Russo resulted in an affirmance of the convictions. *State* v. *LaPierre*, 39 N. J. 156 (1963). Bisignano's petition to the Supreme Court of the United States for the issuance of a writ of certiorari to the New Jersey Supreme Court was denied. 374 U. S. 852 (1963).

Thereafter, each of the defendants filed a petition for federal *habeas corpus* relief with the United States District Court (New Jersey). Bisignano's petition was argued before the court on September 26, 1963. With re-

gard to the petition of Russo, testimony was taken and argument had before the court on October 7 and 8, 1963.

Thereafter, the petitions were consolidated by the court for the purpose of decision, and on February 13, 1964, United States District Court Judge Anthony T. Augelli filed an Opinion and Order denying both petitions. Defendants thereafter filed an appeal from the denial of *habeas corpus* relief with the United States Court of Appeals for the Third Circuit. On May 20, 1965, that court reversed the judgment of the United States District Court for the District of New Jersey and granted the defendants' petitions for writs of *habeas corpus*.

On June 1, 1965, the State of New Jersey filed a petition for rehearing in the United States Court of Appeals for the Third Circuit. That court, in an order filed on October 13, 1965, denied the State's request for a rehearing.

## Reasons Why a Writ of Certiorari Should Be Granted

### Preliminary Statement

The State is aware of the fact that this Court has very recently granted writs of certiorari in cases involving similar questions as those here presented. It is respectfully urged, however, that the total conflict in interpretation of the rule of *Escobedo* v. *Illinois* and the dispute regarding the retroactive application thereof which presently exists between the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit in this case as well as pending cases can be resolved only by the granting of a writ of certiorari in the present case.

## POINT I

**The United States Court of Appeals for the Third Circuit has erroneously expanded the rule of *Escobedo* v. *Illinois* and, thereby, has decided important questions of federal constitutional law which have not been determined by this Court.**

**A. The decision below changes existing constitutional doctrine.**

The court below did not reverse the murder convictions of Frank Bisignano and Anthony Russo because it deemed their confessions to have been involuntarily obtained. In fact, the opinion forthrightly rejected the claims of physical and psychological coercion. The basis for the reversals was the finding that the police had obtained confessions without first having advised defendants of their right to remain silent, of the fact that anything they said might be used as evidence in a trial, or of their right to counsel at a stage when the right to counsel had attached. However, the court did *not* find that these omissions rendered the confession involuntary.

The opinion relies principally upon the cases of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Massiah* v. *United States*, 377 U. S. 201 (1964); and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). The court noted that under *Gideon*, a criminal defendant in a state court has the "same right to counsel" as a criminal defendant in a court of the United States. With this analysis, the State is in agreement. But the court below went further and stated, "the effect of *Gideon* has been to expand the right to counsel and there has been a widening of the concept of the stage or stages when that right attaches." There does not appear to be any language in the *Gideon* case to support the notion that

this Court intended to bring about a substantive expansion of the right to counsel within the meaning of the Sixth Amendment. More accurately, the Sixth Amendment right was afforded to state criminal defendants who, because of the holding in *Betts* v. *Brady*, 316 U. S. 455 (1942), had not previously been entitled thereto.

The court below discussed the decisions in *Massiah* and *Escobedo*, stating preliminarily, "these cases hold that where the right attaches any confession obtained in the absence of counsel must be suppressed independent of any issue of the voluntariness of the confession." (351 F. 2d at p. 436.) The State takes issue with that statement and urges that neither case goes so far as the Third Circuit's opinion suggests.

Winston Massiah's incriminating statements had been obtained through surreptitious tactics at a time when he was under indictment, was without counsel, and was completely unaware that his conversation was being electronically transmitted to a strategically situated federal officer. This Court noted that as the case involved a federal prosecution, the Sixth Amendment was directly applicable and that incriminating words, secretly obtained in the absence of counsel, could not be introduced in evidence. The concluding sentence of the majority opinion reads, "all that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial." (377 U. S. at p. 207). *Massiah*, like *Gideon* before it, represents judicial application—but not expansion—of the right to counsel.

*Escobedo* was surely a logical follow-up to *Massiah*. Confronted with a defendant who had confessed without the assistance of counsel during accusatory police interroga-

tion, this Court found that "it would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." (378 U. S. at p. 486.)

The defendant in *Escobedo* had confessed without having first been effectively warned of his absolute constitutional right to remain silent. In addition, during the time that he was being interrogated, he had repeatedly requested and been denied the opportunity to consult with his lawyer who was present in another room at the police station. Mr. Justice Goldberg, writing for the majority, held as follows:

> "we hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright*, 372 U. S., at 342, 83 S. Ct., at 795 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.' " (378 U. S. at p. 491.)

The court below acknowledged that the present case is factually distinguishable from *Escobedo* in that here neith-

er defendant ever requested that counsel be present. Nevertheless, the court found no adequate basis for distinguishing *Escobedo* because of the factual differences, holding, *inter alia*:

> "The distinction, if there be one, must rest on the absence of a request by Bisignano and Russo to have counsel present during the interrogation. But both reason and precedent dictate against such a distinction.
>
> "At every other stage of the proceedings at which a right to counsel attaches, the right does not depend on a request for counsel nor can it be presumed that failure to request counsel constitutes a waiver of that right. . . .
>
> "We can perceive no sound basis for holding that a request for counsel is a prerequisite for the right to counsel at the interrogation stage while it is not at any other. . . ." (351 F. 2d at p. 437.)

It is submitted that the Third Circuit merged two separate and distinct concepts, *to wit*, the *right* to counsel and the *denial* of the right to counsel. In *Escobedo* it was held that the right to counsel attached when the investigation by the police reached the accusatory stage. The decision is concerned with the effect of police action which affirmatively denied the accused the requested opportunity to consult with his lawyer, and which denied the latter the opportunity to consult with his client. From the particular language contained in the decision, it is apparent that this Court intentionally limited its holding to the precise facts present. It may be said that the opinion is a judicial formula containing the elements which if present constitute the denial of a constitutional right. Nowhere in *Escobedo*

does this Court hold that a confession secured in the absence of counsel must be suppressed if the right to counsel has attached. Actually, as was pointed out by Mr. Justice Harlan in his dissenting opinion, neither *Escobedo* nor any other decision of this Court holds that the Constitution requires the police to affirmatively give "advice" to an accused person.

In interpreting *Escobedo* as it did, the Third Circuit excised the element of request which this Court presented as a prerequisite to a finding of denial of the right to counsel. Judge McLaughlin recognized this fact in his dissent to the denial of the State's request for a rehearing in the present case:

> "If the Supreme Court desires not merely to widen the *Escobedo* rule but to strike from it one of its three required elements and so promulgate a new test, that is up to the Supreme Court alone. Without that action an intermediate appellate tribunal has no duty and no right to make such pronouncement. In so doing, proper law enforcement under the Supreme Court mandate is unwarrantably confused, weakened and broken down." (351 F. 2d at pp. 441-42.)

An additional effect of the decision below is the invalidation of the confession because the record did not disclose affirmative waiver of the right to counsel by the accused. The essence of the holding is the imposition upon the State of the obligation to show that no waiver had occurred. The Constitution does not compel such a burden. It may be queried whether the court in *Russo* would require the advice of counsel as a prerequisite to intelligent waiver. The blanket ruling of the court below presupposes a common and uniform standard of rights awareness or lack thereof

among all criminal suspects. Such uniformity does not exist. In the case *sub judice* the defendants had prior experience with the law. Russo exhibited a keen appreciation of his constitutional rights in refusing to permit the removal of an evidential bullet from his arm until the pain became so excruciating that he could refuse no longer. Bisignano had determined prior to coming into police headquarters to tell the police a fictitious story which he and Russo's girlfriend had contrived during the night.

The Third Circuit's opinion abandons the traditional concept of voluntariness in determining the validity of a confession and broadly holds that a confession, obtained by the police in the absence of counsel, is invalid unless it be shown that defendant was told of and waived his right to counsel. The concept produces as many perplexing problems as it impliedly purports to overcome. For example, if it is conceded that police testimony regarding the elements of voluntariness might conceivably be fabricated, it must also be conceded that dishonest testimony could easily be given to the effect that a defendant was advised of his rights and that he waived them. It does not seem unreasonable to predict that any *intelligent* defendant will ask for a lawyer if told that he has a right to have one present. Only an individual who has no idea whatsoever of the importance of counsel can be expected to waive the right. The Third Circuit's approach is intellectually dishonest and denies equal protection of the laws because it places an unwarranted premium on the ability of an intelligent defendant to act upon the advice given to him by the police.

The State urges that *Escobedo* was properly limited to the particular facts involved. But even if the rule of *Escobedo* is to be enlarged, the impetus should be from this

Court, because only this Court has the authority to do so. It has long been established in the federal system that a court of appeals may not object or obviate the teachings of decision of the United States Supreme Court, even though it may be true that a given Supreme Court decision has been criticized or appears unlikely to be followed in a future decision. *Cf., Stell* v. *Savannah-Chatham County Board of Ed.*, 333 F. 2d 55 (5 Cir. 1964), cert. den. 379 U. S. 933 (1964). The philosophy is well expressed by the Supreme Court of New Jersey in the decision of *Schlemm* v. *Schlemm*, 31 N. J. 557, 571, 158 A. 2d 508, 516 (1960), wherein it is said:

> "The strength of our democracy rests largely upon the constitutional guarantees which the courts enforce and the greatness of our nation is measured largely by the readiness of its people to accept and observe constitutional interpretations and applications by the designated final arbiter, the United States Supreme Court. We, as state judges, would indeed disserve the interests of our country if, because of conflicting local policies, we in any wise sought to disregard or evade the decisions of the Supreme Court as to the meaning and effect of the Federal Constitution."

**B. The Third Circuit's interpretation of *Escobedo* conflicts with decisions of other United States Courts of Appeals and serves to interfere with the orderly administration of criminal justice.**

The interpretation of *Escobedo* in the decision below conflicts with holdings of the United States Court of Appeals for the Second, Fourth, Fifth, and Seventh Circuits as well as that of the District of Columbia. On November 22, 1965, the United States Court of Appeals for the

Second Circuit decided two confession cases, *United States* v. *Robinson*, —— F. 2d —— and *United States* v. *Cone*, —— F. 2d ——, and held that *Escobedo* did not require that a suspect must be advised of his right to silence and of his right to counsel before he is questioned or makes any statement to the police. Acknowledging that "immediate questioning is often instrumental in recovering kidnapped persons or stolen goods as well as solving the crime," the court in *Cone* noted that under such circumstances, "the police should not be forced unnecessarily to bear obstructions that irretrievably forfeit the opportunity of security information under circumstances of spontaneity most favorable to truth telling and at a time when further information may be necessary to pursue investigation, to apprehend others, and to prevent other crimes."

In *Davis* v. *State of North Carolina*, 339 F. 2d 770 (4 Cir. 1964), the defendant had not requested the assistance of an attorney during the time he was being questioned by the police. The court concluded that this fact was one which distinguished the rule of *Escobedo*. Similarly, in *Edwards* v. *Holman*, 342 F. 2d 679, 683-84 (5 Cir. 1965), the Fifth Circuit distinguished *Escobedo* from the case before it on several grounds including the fact that in the former there had been a request for counsel and denial of the opportunity to consult with lawyer while in the latter, "it does not appear that Edwards requested or was denied assistance of counsel prior to his confession."

*United States* v. *Childress*, 347 F. 2d 448 (7 Cir. 1965) involved an appeal from conviction of armed robbery in which defendant argued the applicability of *Escobedo*. The Seventh Circuit affirmed the judgment of conviction, stating:

> "The record before us does not show that defendant ever requested, or was denied an opportunity to con-

> sult with a lawyer. Hence the principle announced in Escobedo has no application in the case at bar. Moreover, the argument made on defendant's behalf that there can be no presumption of a waiver of counsel . . . is not applicable to this case, because, unless his right to counsel was established by the denial of a request by defendant for an opportunity to consult with his lawyer or a lawyer, he had no such right which could have been the subject of a waiver." (347 F. 2d at 40)

Accord, *United States ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837, 843 (7 Cir. 1964), *cert. den.* 379 U. S. 984 (1965).

In *Cephus* v. *United States*, —— F. 2d —— (D. C. Cir. 1965), the United States Court of Appeals for the District of Columbia had before it the contention that because defendant had no counsel during a post-preliminary hearing jail-house interview, the confession therein obtained by the police must be suppressed. In rejecting that contention, Judge Burger, writing for the majority, concluded:

> "The *Escobedo* holding must be read in light of its facts and especially of the purposeful exclusion of Appellant's waiting lawyer from an opportunity to counsel his client while police pursued their interrogation. There, as in *Massiah*, affirmative police action existed preventing counsel and advice after the time when as the Supreme Court decided on the facts in those cases, the right to consult with counsel had attached. Nothing resembling that is shown here. . . ."

In addition to creating a conflict with other United States Courts of Appeals, the decision below has resulted in what might fairly be described as a *bona fide* crisis within the

physical boundaries of the Third Judicial District of the United States. The Third Circuit itself recognized the seriousness of the problem in its per curiam opinion denying a rehearing in this case wherein it is said, "the issues involved in the instant cases are of such importance that they should be put before the reviewing tribunal as promptly as possible." (351 F. 2d at p. 441.) At the present time, the judges of the Third Circuit do not agree among themselves as to what *Escobedo* means (see rehearing denial opinion in *Russo, infra*). The Supreme Court of New Jersey has consistently held that in the absence of a request to consult with an attorney, an accused's right to the assistance of counsel has not been denied. *State* v. *Coleman*, —— N. J. ——, —— A. 2d —— (1965); *State* v. *Ordog*, 45 N. J. 347, 361-62, 212 A. 2d 370 (1965); *State* v. *Lanzo*, 44 N. J. 560, 566-67, 210 A. 2d 613 (1965); *State* v. *Bindhammer*, 44 N. J. 372, 384, 209 A. 2d 124 (1965). In the *Coleman* case, *supra*, the Supreme Court of New Jersey commented upon the decision below and stated:

> "In the course of its decision, the Third Circuit went beyond the actual holding in *Escobedo* and construed the Supreme Court's opinion as broadly invalidating confessions such as those made by the defendants Russo and Bisignano while in custody and without counsel, no request for counsel having been made by them. The view thus expressed, while binding in *Russo* (subject to any further review in the Supreme Court), is not binding on us in other cases which come before us in the exercise of our acknowledged State jurisdiction. In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court." (—— N. J. at p. —)

The Supreme Court of Pennsylvania, while disagreeing with the Third Circuit, now regretfully abides by the latter's holding in the present case solely in order to assure that judgments may be clothed with finality. Until the decision in the present case, the State of Pennsylvania was in accord with the New Jersey position on *Escobedo*. *Commonwealth* v. *Patrick*, 416 Pa. 437, 206 A. 2d 295 (Sup. Ct. 1965). However, in the recent decision of *Commonwealth* v. *Negri*, —— Pa. ——, —— A. 2d —— (Sup. Ct. 1965), the Supreme Court of Pennsylvania reversed its previous position and held that it was bound to follow the interpretation contained in the decision below by the United States Court of Appeals for the Third Circuit. The announced basis for the reversal of position was that in light of the existence of the decision in *Russo*, a defendant convicted in Pennsylvania could, for all practical purposes, "walk across the street" and gain a different result in the Court of Appeals. Thus, acknowledging that the situation presented a serious conflict between sovereign jurisdictions, the Pennsylvania Court, in the desire to secure finality of judgments, elected to follow the Third Circuit ruling "until some further word is spoken by the Supreme Court of the United States."

Because of the conflict and confusion which exists in the United States and particularly in the Third Judicial District thereof, the State of New Jersey respectfully urges this Court to grant a writ of certiorari in the present case. Only through the granting of the writ will the interpretative differences between the Third Circuit and the Supreme Court of New Jersey be resolved. Most importantly, a decision from this Court in the present case will serve to educate and guide those charged with the responsibility for law enforcement and will enable them to understand what must be done to assure that persons suspected of crimes violations will be afforded all rights which are their due under the Constitution. Review by this Court in the pres-

ent case will restore the element of orderliness to the administration of criminal justice. Finally, the strong factual setting of the instant case makes it an appropriate one for this Court to utilize in defining the exact contours of its decision in *Escobedo* v. *Illinois* concerning the right to counsel during police interrogation.

## POINT II

**The United States Court of Appeals for the Third Circuit, in according the decision of *Escobedo* v. *Illinois* retroactive operation in a *habeas corpus* appeal, has decided a very important question of constitutional law which has not been determined by this court and in a manner which is in conflict with the decisions of other federal courts.**

### A. The United States Court of Appeals did, in fact, decide that the decision of *Escobedo* v. *Illinois* was to be given retroactive operation.

The United States Court of Appeals for the Third Circuit accorded the decision in the *Escobedo* case retroactive operation so as to upset the judgments of conviction in the case at bar. Although that court, in its opinion denying the State's petition for rehearing, stated that it did not "pass upon the issue of retroactivity," it still cannot be disputed that the court applied the *Escobedo* decision to convictions which had come final before *Escobedo* had been announced. The above analysis is in complete accord with this Court's definition of the word "final" as contained in *Linkletter* v. *Walker*, 381 U. S. 618 (1965):

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for Petition for Certiorari had elapsed before decision . . ." (85 Sup. Ct. at 1734, n5.)

Under the above definition, the court below could not have invalidated the judgments of conviction without at least impliedly ruling that *Escobedo* was to be applied retroactively. The fact that the above decision was retrospectively applied without discussion is of no consequence since this Court, itself, has previously applied new constitutional rules, without discussion, to cases which became final before rendition of the rule. (See *Linkletter* v. *Walker, supra,* 381 U. S. at 628 (n. 13).

Moreover, the Court of Appeals was in error in claiming that the issue of retractivity was not before the court. As aptly noted by Judge Forman in his concurring opinion, the date of exhaustion of the direct appeal remedies by the defendants (June 17, 1965), and the date of the *Escobedo* decision (June 22, 1964), were matters of record and therefore were validly before the court. (351 F. 2d at 442)

Thus, as can be seen by the foregoing discussion, there can be no question that the appellate court below had ruled, albeit impliedly, that the decision in *Escobedo* v. *Illinois* was to be given retroactive application.

**B. Constitutional doctrines allow this Court a choice whether to apply *Escobedo* retroactively.**

The early common law approach to retroactivity was based on the Platonic, metaphysical principle that the true law had an ideal and immutable existence. Under this view, the duty of the court was not to "pronounce a new law, but to maintain and expound the old one." I *Blackstone Commentaries*, 69 (1769). Thus, judges were thought to discover the law rather than create it. However, our courts have since adopted a more realistic approach to this question and have tended to regard the foregoing philosophy as a "splendid myth." *U. S. ex rel. Durocher* v. *La Vallee*, 330 F. 2d 303, 312 (2 Cir. 1964).

The case of *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1942) represents an initial departure from the Blackstonian view of retroactivity. The issue, in the above case, was what effect should be given to judgments which were based on a statute which since had been declared unconstitutional. The federal courts below proceeded on the theory that since the statute had been found to be unconstitutional it was never law and did not even confer any rights or impose any duties. In reversing, Chief Justice Hughes, speaking for a unanimous Court stated:

> "The actual existence of a statute, prior to such determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attentions of courts, state and federal, and it is manifest that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." 308 U. S. at 374.

The weight to be given a final judgment, even on a *habeas corpus* petition, is illustrated by the case of *Warring* v. *Colpoys*, 122 F. 2d 642 (D. C. Cir.), *cert. denied* 314 U. S. 678 (1941). In the above case, the defendant was convicted in 1939 of criminal contempt. In reliance on this

Court's interpretation of the federal contempt statute, he entered a plea of guilty. In 1941, this Court overruled its prior decision defining the limits of the federal contempt statute, changing its interpretation so that the defendant could not have been convicted subsequent to the overruling decision. In ruling that *habeas corpus* could not be used to nullify what was a valid judgment at the time of its rendition, the court per Judge (later Chief Justice) Vinson stated in part:

> "These considerations [of the nature of the law and its administration] should guide the lawmakers and the lawappliers in making their determinations in respect of whether a change in the law is to be effective only for the future or also for the past, and if the latter, to what extent. And these considerations should be applicable to both sides of a potential litigation, civil or criminal, so that we may have our rules of the game as we go.
>
> We believe that appellant is not entitled to discharge upon the habeas corpus writ. The District Court had the power to sentence him in a criminal contempt proceeding in 1939. The Nye case of 1941 should not be applied so as to sweep away that power as of 1939. This collateral attack, then is unavailing. We reject the idea that if a court was considered to have the power in 1939 to do a certain thing under existing statutory construction, and in 1941 that construction is changed so that it no longer has the power to do that thing, it should be concluded that it never had the power in 1939. It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. *It seems even sounder to say that the living should not be governed by their posterity for that, in turn,*

*would be downright chaotic.*" Id. at 646-47. (Emphasis and insert added)

A similar approach was recently employed in *United States* v. *Sobell*, 314 F. 2d 314 (2 Cir.), *cert. denied* 374 U. S. 857 (1963) where the court held that an overruling decision of this Court should not be applied retroactively on a collateral attack via a *habeas corpus* petition so as to upset a previously valid judgment. The court stated in this regard:

> "There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause 'litigation in these criminal cases (to) be interminable' 332 U. S. at 182, 67 S. Ct. at 1593, but, in the sole interest of those already convicted of crime, would drastically impair the inability of the Government to discharge the duty of protection which it owes to all its citizens." (314 F. 2d at 324.)

The court also took cognizance of the great difficulties inherent in retroactively applying new rules on a collateral attack as opposed to doing same on a direct appeal:

> "When a claim is raised upon direct appeal as this could have been, and is there sustained, a new trial can be had seasonably, when witnesses are still available and their recollections still fresh. In contrast, collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to

> direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend he is entitled to that relief from the courts. When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws. All this is the wisdom behind the doctrine that limits collateral attack on criminal judgment. (314 F. 2d at 325).

The question concerning the compulsory retroactivity of a new constitutional principle was definitively settled by this Court in *Linkletter* v. *Walker, supra,* where it was specifically held that:

> ". . . (W)e believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said 'We think the Federal Constitution has no voice upon the subject.'" (85 Sup. Ct. at 1737.)

This Court then went on to establish guide lines for determining whether a new constitutional rule should be given retroactive effect:

> "Once the premise is accepted that we are neither required to nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (85 Sup. Ct. at 1738.)

Therefore, in view of the foregoing, the *Escobedo* decision should not be retroactively applied unless it be explicitly found that the above factors favor such application.

**C. The pertinent judical and social considerations militate against retroactivity.**

***1. The purpose of the Escobedo decision will not be achieved by giving it retroactive operation.***

The holding of the *Escobedo* decision as apparently set forth by this Court was that a suspect should be permitted to consult with his attorney during the police interrogation before arrest. The reason for permitting him to have the "guiding hand of counsel," was that it "was essential to advise [him] of his rights in this delicate situation." 378 U. S. at 486. A suspect informed of these rights was thought to be less apt to give an ill-advised confession.

As seen by the foregoing, the purpose of *Escobedo* was to deter police interrogation of a suspect without counsel so as to prevent unwary self-incrimination. It is respectfully urged that this purpose will not be achieved by giving *Escobedo* retroative effect. That decision was an attempt to "sterilize the police ante-chamber," and to correct the conditions which invited coerced confessions and improvident self-incrimination. *In re Lopez*, 42 Cal. Rptr. 188, 398, P. 2d 380, 384 (1965); *State* v. *Johnson*, 43 N. J. 572, 588, 206 A. 2d 737 (1965); *Walden* v. *Pate*, —— F. 2d —— (7 Cir. 1965); 34 U. S. L. Week 2065 (July 27, 1965); *United States* v. *Pate*, 240 F. Supp. 237, 240 (N. D. Ill. 1915); *Commonwealth* v. *Negri*, —— Pa. ——, —— A. 2d —— 34 U. S. L. Week 2186 (Sup. Ct. Pa. October 12, 1965). It sought to deter future police conduct rather than to prevent behavior which had already been sealed by the past. Indeed, it is self-evident that "misconduct of the police has already occurred and will not be corrected by releasing the prisoners involved." *Linkletter* v. *Walker*, *supra*, 85 Sup. Ct. at 1741-42. The above view has been expressed by the Supreme Court of California in the following manner:

". . . . We believe that the United States Supreme Court in Escobedo sought primarily to prevent police tactics which, in the past, have spawned involuntary confessions. The court has concluded that presence of counsel would go far to eradicate such tactics. As a means to that end it held that, if the opportunity to procure such counsel had been denied, the confession or incriminating statement procured by the police should not be introduced into evidence. Thus the rule contemplated the prospective prevention of coercive practices—not the extirpation of such practices committed in the past." *In re Lopez*, 398 P. 2d at 383.

Similarly, the United States Court of Appeals for the Seventh Circuit held as follows:

"The purpose of the *Mapp* and *Escobedo* rules is the deterrence of abuses by law enforcement officers. Experience had shown that the only effective means of enforcing compliance with the Fourth Amendment's prohibition against illegal searches and seizures was to render all evidence thus obtained inadmissible, and in *Mapp* the Supreme Court took that step. *Escobedo* was likewise the culmination of long experience with cases involving defendants who had been held and gave confessions without assistance of counsel. The administration of justice suffered from the difficulties for the trier of fact and for courts of review of determining from the conflicting testimony of the interested parties whether a confession was or was not voluntary; and a condition existed where ignorance of constitutional rights and absence of counsel operated to the prejudice of persons in custody. In order to put an end to a system so fraught with potential abuses, the Supreme Court in *Escobedo* decided to remove the incentive to deny an ac-

cused the right to counsel by rendering inadmissible any confession obtained while such denial was in effect. It is because of the similarity of purposes that we, as the Supreme Court did with the *Mapp* rule in *Linkletter* v. *Walker*, hold that the rule of *Escobedo* does not apply retrospectively." *Walden* v. *Pate*, —— F. 2d —— (34 U. S. L. Week 2065.)

As seen by the foregoing, the purposes of the *Escobedo* decision would not be served by allowing final judgments of state courts to be reopened and collaterally attacked many years after their rendition.

**2. *A confession excluded under the Escobedo rule is not inherently unreliable and therefore does not have a clear capacity for conviction of the innocent.***

Until the *Massiah* and *Escobedo* decisions, the state courts employed the traditional voluntary-involuntary test to determine whether a confession was properly admissible in evidence. *Culombe* v. *Connecticut*, 367 U. S. 568 (1961). Failure to advise a defendant of his right to an attorney and of his right against self-incrimination were merely factors to be considered in the "totality of circumstances" in determining whether a confession was involuntary. *Haynes* v. *Washington*, 373 U. S. 503, 516, 517 (1963). If a confession was found to be involuntarily given it was excluded for the reason, *inter alia*, that there is "likelihood that the confession is untrue." *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960); *Jackson* v. *Denno*, 378 U. S. 368, 385-86 (1964).

With the advent of *Escobedo*, this Court, for the first time, excluded a confession, although found to be voluntary, (378 U. S. at 484) on the sole ground that the petitioner should have been granted his request to see his attorney before making his statement. As stated previously, the confession in *Escobedo* was not excluded because it was in-

voluntary or unreliable, but was suppressed merely as an effective means of deterring and preventing a certain method of police conduct during interrogation.

Since the introduction of *Escobedo*-type confessions does not affect the guilt-determining process or have a clear capacity to convict the innocent, there will then be no necessity to needlessly overturn past convictions where the reliability of those convictions are not seriously impugned. Because the purpose of rule is, in essence, exclusionary as it was in *Mapp*, an analogy can be drawn to *Linkletter* where this Court denied retroactivity in part because the "integrity of the fact-finding process," and "the fairness of the trial," were not under attack. 85 Sup. Ct. at 1743. These observations are acutely applicable in the case at bar where the New Jersey Supreme Court, the United States District Court, and the United States Court of Appeals for the Third Circuit all found that the instant confessions were voluntary.

Chief Justice Traynor's remarks concerning the retroactivity of a new exclusionary rule of law (*Mapp*) are also particularly relevant in the *Escobedo* area:

> "The most telling reason for collateral attack on judgments of conviction is that it operates to eliminate the risk of convicting the innocent. Such a risk attends any conviction ensuing from the witting use of perjured testimony, the suppression of evidence, an involuntary confession, the denial of an opportunity to present a defense, the denial of the right to counsel. A comparable risk arises upon a failure to provide an indigent defendant with a trial transcript necessary to perfect his appeal.
>
> "The most telling distinction of a defendant convicted on evidence resulting from an unreasonable search or seizure is that he is clearly guilty. It is not the

purpose of the exclusionary rule to protect the guilty. Its purpose of deterring lawless law enforcement will be amply served in any state from now on by affording defendants an orderly procedure for challenging the admissibility of the evidence at or before trial and on appeal.

"Deterrence would be served but little more and at exorbitant cost by affording the weapon of collateral attack to those defendants who were convicted before the adoption of any exclusionary rule and hence had no way of challenging the admissibility of the evidence. To begin with, their cases are history, and they should not now be given the power to rewrite it. To place at the disposition of the guilty an extraordinary remedy designed to insure the protection of the innocent would be to invite needless disruption in the administration of justice. There is a world of difference between a timely objection to evidence on the basis of the exclusionary rule and the uprooting of final judgments." Traynor, *Mapp, at Large in the Fifty States.* 1962 Duke L. J. 319, 340-41 (1962).

The Supreme Court of New Jersey considered the above factors in deciding that *Escobedo* should not be retroactively applied.

"Where the reliability of the guilt-determining process is seriously impugned, there is good reason for applying the new rule to a case already decided. It would offend our sense of justice to continue to incarcerate a convicted man where subsequent considerations cast grave doubts upon the reliability of the determination of his guilt. But where the conviction was obtained as a result of a procedure not considered fundamentally unfair at that time, and subsequent judicial decisions cast no substantial doubts

upon the reliability of the determination already made, no compelling reason exists for disturbing a decision no longer subject to direct appeal."

". . . Unlike Gideon, the rule of law which the defendants contend *Escobedo* announces does not raise substantial doubt as to the reliability of the determination of guilt. Therefore, we will not apply that rule to the prior convictions [here] . . .." *State* v. *Johnson, supra,* 43 N. J. at 585, 587.

Since the *Escobedo* decision does not cast doubt on the integrity of the fact finding process, our "deepest sentiments of justice," are not offended and therefore justice would not be served by giving it retroactive application.

***3. The New Jersey courts justifiably relied on previous decisions of this Court in admitting the confessions in question into evidence.***

At the time the instant case came before the New Jersey Supreme Court (*State* v. *La Pierre,* 39 N. J. 156 (1963)), the criteria employed for the admissibility of a defendant's confession in a state criminal trial was the voluntariness test. *Culombe* v. *Connecticut, supra.* There were previous decisions that failure to advise a defendant of his right to counsel and his right against self-incrimination were merely factors to be considered in determining the voluntariness of a particular confession. *Fikes* v. *Alabama,* 352 U. S. 191, 197 (1951); *Gallagos* v. *Nebraska,* 342 U. S. 55, 65 (1951). Moreover, this Court in two prior decisions specifically held that a confession was not, *ipso facto,* inadmissible merely because it was obtained after a suspect had been denied his request for assistance of counsel. *Crooker* v. *California,* 357 U. S. 433 (1958); *Cicenia* v. *La Gay,* 357 U. S. 504 (1958).

As established previously, since the *Escobedo* decision announced a new rule concerning the admissibility of con-

fessions in state criminal trials, the state courts of New Jersey as well as the United States District Court were perfectly justified in relying on the "voluntariness" test as well as the *Crooker* and *Cicenia* decisions in admitting the confessions. These courts should now not be held to an occult standard of clairvoyance of anticipating new judicial pronouncements which were not on the legal horizon when they rendered their decisions.

As with the *Wolf* doctrine prior to *Mapp*, the pre-*Escobedo* decisions are "operative fact[s] and . . . have consequences which cannot be justly ignored." 85 Sup. Ct. 1741. The many cases that were finally decided on the "voluntariness" doctrine "cannot be obliterated". Here, "prior determinations deemed to have finality and acted upon accordingly have been vested," *Ibid.*

It is therefore a significant consideration in passing upon the question of the retroactivity of *Escobedo* that the state courts placed legitimate reliance on the former law in this area. For this Court to now nullify past confessions by applying *Escobedo* retroactively, would be to hold that the state courts should have excluded certain confessions when at the time that these confessions were reviewed, this Court had clearly informed them that their exclusion was not constitutionally required.

***4. Non-retroactivity of Escobedo is fully consistent with prior decisions of this Court.***

The same factors which prompted this Court to hold *Mapp* non-retroactive in *Linkletter* are also present concerning the question of the retroactivity of *Escobedo*. As with *Mapp*, (1) The purpose of the *Escobedo* rule would not be served by its retroactive application, (2) The state courts justifiably relied on the pre-*Escobedo* "voluntariness" doctrine, (3) The *Escobedo* decision does not impugn the fairness of the trial, (4) The retroactive application of

*Escobedo* would have a catastrophic effect on the administration of justice. *Linkletter* v. *Walker, supra,* 85 Sup. Ct. at 1741-43. To the extent that the above circumstances are present in both situations, the *Linkletter* case must be considered authority against the retroactivity of *Escobedo.*

The *Escobedo* situation is far removed from those cases where new constitutional principles were applied retroactively. Retroactivity of new constitutional rules were granted only in instances where the alleged violation of the defendants' rights deprived them of a fair opportunity to litigate the question of their guilt or innocence.

In *Gideon* v. *Wainwright, supra,* this Court held that the Sixth Amendment granted to every defendant the right to counsel in all criminal trials. It was determined that without the assistance of counsel an innocent defendant could "face the danger of conviction because he does not know how to establish his innocence." 372 U. S. at 345. Because *Gideon* challenged the reliability of the judicial determination of guilt, it was applied retroactively. *U. S. ex rel. Durocher* v. *La Valle,* 330 F. 2d 303 (2nd Cir. 1964). Moreover, *Gideon* was a collateral attack, whereas *Escobedo* was a direct appeal.

In *Griffin* v. *Illinois,* 351 U. S. 12 (1956) this Court held that without a transcript a defendant could not obtain an adequate appellate review of the alleged errors at the trial. Without proper appellate review, a defendant's conviction could still be opened to serious doubt and therefore the *Griffin* rule was applied retroactively in *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U. S. 214 (1958).

Similarly, the coerced confession cases were held retroactive because since these confessions were potentially unreliable they could result in conviction of an innocent defendant. *Reck* v. *Pate,* 367 U. S. 433 (1961); *Fay* v. *Noia,*

372 391 (1961). Moreover, "the principle that a coerced confession is not admissible in a trial *pre-dated* the arrest as well as the original conviction in each of these cases." *Linkletter* v. *Walker, supra,* 85 Sup. Ct. at 1742. (Emphasis supplied.) In view of the foregoing, the non-retroactive application of *Escobedo* would be fully consistent with the logic and rationale of the apposite cases in this area.

***5. The burdensome effect of retroactivity would severely impair the administration of justice.***

Requiring both the state and federal courts to entertain and review the pertinent claims of all pre-*Escobedo* prisoners would severely disrupt the effectiveness of the judicial system. Initially, there would have to be collateral proceedings to determine whether certain confessions would be excluded. If these confessions were excluded, new trials would be afforded to defendants who have been since convicted. Prisoners who seek the benefit of the new rules would then have certain advantages they would not have had if the new rules were announced at the time of original trial. In all probabilities, witnesses available at the time of the original trial would not be available at the re-trial, or if available their memories would now be dimmed. Because of these circumstances, many prisoners would be set free because of an infirmity which does not affect the veracity of their former convictions. "To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." *Linkletter* v. *Walker, supra,* 85 Sup. Ct. at 1742.

Since all the state courts relied on the pre-*Escobedo* "voluntariness" doctrine, then consequently, all would be affected by a ruling in favor of retroactivity. The new collateral hearings which would be precipitated as a consequence of the retroactivity ruling would greatly increase

the presently congested court calendars and create an even greater backlog of criminal cases than exists today. The same result would also be produced to a great extent in the federal courts by means of review of federal convictions in the form of *habeas corpus* petitions. The above conditions would of necessity have the effect of postponing and delaying the disposition of many pending criminal trial and appeals.

Also, society has an interest in preventing a flood of relitigation. *State* v. *Johnson, supra*, 43 N. J. at 583-584 discusses this proposition in the following manner:

> "Furthermore, retroactive application of a new rule of law undermines the authoritative nature of final judicial decision. Society reasonably expects that when a man is convicted of a crime by a method not considered unfair according to the rules of law then in effect, that conviction will stand. Therefore, unless some countervailing considerations of the deepest sentiments of justice compel otherwise, a new rule of criminal law should not be applied retroactively."

The unlimited retroactivity of *Escobedo* would also have the effect of impairing the free development of constitutional law in the states courts. Although the federal courts prescribe minimum standards in certain areas of constitutional law, the state courts are free to apply more stringent standards if they so desire. *Ker* v. *California*, 374 U. S. 23 (1963). However, these courts would be recitent to apply new constitutional principles for fear that they would be given unlimited retroactivity and would result in the wholesale release of many prisoners. This would stultify the evolution of law in an area which requires revision due to the rapidly changing social conditions and attitudes of our period.

**D. There is a conflict among the several United States Courts of Appeals and many of the highest state tribunals concerning the retroactivity of *Escobedo* and the great majority of these courts have denied retroactivity.**

In addition to the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Ninth Circuit in the case of *Wright* v. *Dickson*, 336 F. 2d 878 (9 Cir. 1964) indicated that it would apply *Escobedo* retroactively. Relying upon that court's decision, the United States District Court for the District of Nebraska, specifically held that *Escobedo* was to be applied retrospectively (*Fugate* v. *Ellenson*, 237 F. Supp. 44 (D. Neb. 1964), but this decision was subsequently held in an abeyance pending review of that question by the state courts of Nebraska. *Ellenson* v. *Fugate*, 346 F. 2d 151 (8 Cir. 1965). See also *Golaza Cruz* v. *Delgado*, 233 F. Supp. 944 (D. Puerto Rico 1964), where *Escobedo* was applied retroactively without discussion on a *habeas corpus* petition.

To the contrary, are decisions by the United States Court of Appeals for the Seventh Circuit (*Walden* v. *Pate, supra*) and the United States District Court for the Northern District of Illinois (*United States ex rel. Conroy* v. *Pate*, 240 F. Supp. 237 (N. D. Ill. 1965) which denied retroactivity. See also *Timmons* v. *Payton*, 240 F. Supp. 749 (E. D. Va. 1965) where it was held that if no objection was imposed to the introduction of the confession it could now not be raised as an issue in post-conviction proceedings. *But see* the dissenting opinion of Chief Judge Soboloff in *Davis* v. *North Carolina*, 339 F. 2d 770, 787 (4 Cir. 1964), where he stated that *Escobedo* was to be accorded retroactivity.

Several of the state tribunals have ruled against retroactivity. *In re Lopez, supra* (California); *Ruark* v. *People*, —— Col. ——, —— P. 2d —— (34 U. S. L. Week 2213 Sup. Ct. Col. October 26, 1965); *People* v. *Hovnanian*, 22

A. D. 2d 686, 252 N. Y. S. 2d 241 (1964); modified in *People* v. *Huntley*, 15 N. Y. 2d 72, 255 N. Y. S. 2d 283 (1965); *Clark* v. *State*, —— Fla. ——, 175 So. 2d 80 (District App. 1965). It is also of importance to note that two of the three state jurisdictions within the province of the Third Circuit have differed with that court and denied *Escobedo* any effect in post-conviction proceedings. *State* v. *Johnson*, *supra*; *Thornton* v. *Yeager*, —— N. J. ——, —— A. 2d—— (1965); *Commonwealth* v. *Negri*, *supra*, —— Pa. ——, —— A. 2d —— (1965).

The uncertainty in this area has also bred the highly paradoxical situation where there are two opposing decisions concerning the issue at bar in the United States District Court for the District of New Jersey. In one instance, the District Court held that the *Escobedo* and *Russo* decisions were not retroactive (*Wade* v. *Yeager*, —— F. Supp. ——, 88 N. J. L. J. 599 (September 16, 1965), opinion by Judge Wortendyke filed August 27, 1965) and in another case a prisoner obtained a writ of *habeas corpus* where the trial judge applied *Escobedo* to overturn the prisoner's conviction in a post-conviction proceeding (*Holley* v. *Yeager* opinion filed by Judge Meaney on June 7, 1965). Thus, as this confused situation presently exists, a defendant who is denied relief in a particular state court may simply "walk across the street" and obtain the result he wishes from the United States District Court sitting in that state. Also, a prisoner who was convicted in one federal judicial circuit and who later pleads *Escobedo* in a post-conviction hearing may go free, whereas another who relies on the same case in another circuit may still remain incarcerated.

**E. The issue of the retroactivity of *Escobedo* is one of great importance and requires prompt adjudication by this court.**

Perhaps the best statement that can be given in support of the petitioner's request for *certiorari* are the remarks of the appellate court below where it asserted that "[t]he issues involved in the instant case are of such importance that they should be put before the reviewing Tribunal as promptly as possible." 351 F. 2d at 440. Here, we have an explicit plea by a United States Court of Appeals that the issue at bar should be definitively settled by this Court "as promptly as possible."

As illustrated previously, the courts are groping for answers in a nascent, faintly-illuminated area of the law. For these reasons, they have taken different paths as to how the *Escobedo* case should be implemented. This has created the anomalous situation where a prisoner who is denied relief in the state courts may simply shop for a more favorable disposition in the federal courts. If this unfortunate result were allowed to remain, it would breed disrespect for the law in the minds of the public who reasonably expect that criminal laws will be enforced and administered in a rational and congruous manner.

As seen by the above, the issue of retroactivity requires a prompt, definitive decision by this Court. Postponement of a determination on this question to a future date invites more uncertainty and confusion in a new and nebulous area of law whose contours are still ill-defined. Furthermore, if this Court does defer review of this question and subsequently decides against retroactivity, then many convicted criminals may be needlessly set free in the interim. This could then be viewed as "geographical" discrimination to those prisoners who remained incarcerated because they had the unfortunate chance of being con-

victed within a jurisdiction or federal circuit whose courts have denied retroactivity.

This court should not decline review of the instant question merely because the appellate court below stated that it did not decide the question of retroactivity. As established previously, it is beyond dispute that the *Escobedo* decision was retroactively applied by the court below on a *habeas corpus* appeal to upset the conviction of the instant defendants. To refuse review of the case at bar and allow the writ of *habeas corpus* to stand would be tantamount to an implied concurrence by this Court in the result that *Escobedo* can be used to collaterally attack past convictions. This action undoubtedly will be relied upon as precedent in future *habeas corpus* applications where *Escobedo* is employed to as collaterally attack former convictions.

Similarly, if this Court eventually rules against retroactivity then this would be highly discriminatory to those defendants who happened to have the question of retroactivity explicitly passed upon in their appeals and thus could not reap the unexpected benefit of an implied ruling of retroactivity as did the instant defendants. This arbitrary result would be giving form ascendancy over substance.

This Court, after announcing new and important principles of constitutional criminal law, has granted prompt *certiorari* to determine whether these newly rendered rules should be retroactively applied. This tribunal agreed to review the retroactivity of the *Mapp* decision when it granted *certiorari* three years after *Mapp in Linkletter* v. *Walker*, 377 U. S. 930 (1964). In *Griffin* v. *California*, 380 U. S. 609 (decided April 28, 1965) it was held that it was improper to comment in a state criminal proceeding concerning the accused's failure to testify. Approximately one month later, this Court granted *certiorari* to review the "question of the retroactivity of the doctrine announced

in *Griffin v. California*"; *Tehan* v. *Shott,* 381 U. S. 923 (*certiorari* granted May 24, 1965). Since the holding in *Ecsobedo* is not as narrow and well defined as those of *Mapp* and *Griffin* it is even more urgent that the question of its retroactivity be settled as quickly as possible.

It has been stated by this Court that its discretion of *certiorari* will be exercised where the circumstances of the case involve "the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeals, or between Courts of Appeals and the Courts of a State, or some matter effecting the interest of this nation in its internal or external relations. . . ." *Forsyth* v. *Hammond,* 166 U. S. 506, 514-15 (1896). It is respectfully submitted that the case at bar presents precisely such circumstances. The issues involved herein are of such importance that they ultimately must be decided by this Court and an immediate answer to the myriad of pressing questions which are arising from the courts of the fifty states will do much to alleviate the existing chaotic conditions in a newly created, but highly important, area of criminal law.

## CONCLUSION

**For the reasons discussed above, it is respectfully urged that *certiorari* should issue to review the decision of the court below.**

Respectfully submitted,

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*Of Counsel and on the Petition.*

# APPENDIX

## Opinions of United States Court of Appeals for the Third Circuit (Reported in 351 F. 2d 429—1965)

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UNITED STATES OF AMERICA, EX REL. ANTHONY RUSSO,

Appellant,

*vs.*

THE STATE OF NEW JERSEY and the Principal Keeper of the State Prison at Trenton, New Jersey.

UNITED STATES OF AMERICA EX REL. FRANK BISIGNANO,

Appellant,

*vs.*

THE STATE OF NEW JERSEY and the Principal Keeper of the State Prison at Trenton, New Jersey.

Nos. 14833, 14869.

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UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

Argued Nov. 12, 1964.

Decided May 20, 1965.

Rehearing Denied Oct. 13, 1965.

Before BIGGS, Chief Judge, and FORMAN and SMITH, Circuit Judges.

BIGGS, Chief Judge,

*Opinions of United States Court of Appeals for the Third Circuit (Reported in 351 F. 2d 429—1965)*

These are appeals from denials of writs of habeas corpus by the court below. The petitioners-appellants, Russo and Bisignano, with a co-defendant, LaPierre, were indicted and convicted of murdering a policeman in Newark, New Jersey. The murder was committed while Russo and Bisignano were engaged in the commission of the felony of attempting to rob a tavern. The convictions were affirmed by the Supreme Court of New Jersey, State v. LaPierre, 39 N. J. 156, 188 A. 2d 10 (1963). Bisignano attempted to have his conviction reviewed by the United States Supreme Court, but certiorari was refused. Bisignano v. New Jersey, 374 U. S. 852, 83 S. Ct. 1920, 10 L. Ed. 2d 1073 (1963).

The operative facts are as follows. At approximately 11:15 on the night of March 15, 1961, Russo and Bisignano, with La Pierre, attempted to "holdup" a tavern in Newark, New Jersey. Bisignano and Russo entered the tavern; Russo, brandishing a revolver, announced their purpose. Joseph Hagel, an off-duty policeman, was present and drew a pistol in an attempt to prevent the robbery. Shots were exchanged; Hagel was mortally wounded, while Russo was struck by a bullet in his right arm. Russo, LaPierre and Bisignano then fled from the tavern. LaPierre was quickly apprehended by Newark police officers less than three blocks from the scene of the crime. Soon thereafter, Russo was seized approximately five blocks from the tavern. Bisignano was arrested the following morning.

When LaPierre and Russo were placed under arrest, they were first taken back to the tavern. None of the four eye witnesses to the shooting was able to identify LaPierre since, as it later developed, LaPierre had been stationed outside of the tavern in the "getaway" car. Russo was identified immediately as possibly being one of the two men

who had attempted the robbery, although none of the four witnesses positively identified Russo.

LaPierre was then taken to police headquarters while Russo was taken to a hospital for treatment of his wounded right arm. He was admitted to the hospital in the early morning of March 16. After emergency treatment was rendered to Russo, he was questioned for a short time by four members of the Newark police force, but he refused to admit complicity in the crime. Russo also refused to permit an operation to excise the bullet from his arm. However, the pain from the bullet became excruciating and, on March 17, he submitted to an operation. He was accompanied to the operating room by a police officer. Upon return to his hospital bed from the operating room, Russo, for the first time, admitted his participation in the attempted hold up under the questioning of two police detectives. After the operation, Russo was detained at the hospital until March 24, at which time he was released from the hospital in the custody of the police. It is undisputed that during Russo's entire detention in the hospital he was under constant police guard. In addition, he was shackled to the bed to prevent, we assume, any possibility of escape. Interrogation at the hospital was sporadic and it appears that no sustained interrogation was made between the oral admissions on the 17th and the his release from the hospital on the 24th.

Upon Russo's release from the hospital he was taken directly to an interrogation room at police headquarters. He was questioned there for approximately two hours before he confessed orally. Russo was then detained in the interrogation room for an additional three hours so that his oral statement could be reduced to writing and signed by him.

Russo was not taken to a magistrate for a preliminary hearing until March 28. At that time, Russo's hearing was postponed until April 4. No explanation appears in the record as to the reason for the postponement,[1] but it is relevant to note that the Grand Jury returned an indictment on March 30.

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[1] The New Jersey Crim. Prac. R. 3:2-3 provides in pertinent part:

"(a) Appearance. * * * A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate * * *.

"(b) Preliminary Hearing. The magistrate shall inform the defendant of the complaint against him and if a copy of the complaint has not previously been furnished to the defendant, he shall be supplied with a copy thereof. The magistrate shall also inform the defendant of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. * * *

"(c) Preliminary Examination. * * * If the defendant does not waive [preliminary] examination, the magistrate shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him. If, from the evidence, it appears to the magistrate that there is probable cause to believe that an offense has been committed and the defendant has committed it, the magistrate shall forthwith bind him over to await final determination of the cause, otherwise, the magistrate shall discharge him * * *. The magistrate shall admit the defendant to bail as provided by these rules."

*Opinions of United States Court of Appeals for the Third Circuit (Reported in 351 F. 2d 429—1965)*

At the trial in the Essex County Court, Law Division, held at Newark, New Jersey, there was psychiatric testimony to the effect that Russo was within "the lower reaches of the average range of intelligence." There was also evidence that Russo "was markedly deficient with respect to his capacity for verbal abstraction, the capacity to think abstractly, and the capacity to evaluate external reality with any validity, with any substance, with any genuine understanding of what is going on around him * * * that his social judgment and perceptual alertness were massively impaired with respect to what the norm might be."

Bisignano was arrested on the morning of March 16 at approximately 10:30 and was taken immediately to a soundproof interrogation room. He was questioned for about two and a half hours by at least nine different policemen working in relays of four and five. During this interrogation period LaPierre was seated outside of the interrogation room. At frequent intervals, policemen questioning LaPierre would check his answers with Bisignano's answers and Bisignano's answers were checked against LaPierre's answers. In addition, the answers of both were being checked against a statement given to the police by Veronica Szmatowicz, who was Russo's fiancee, who had been arrested with Bisignano that morning. As a result of this cross-checking of stories, it is difficult to determine accurately how many police officers actually participated in the questioning of Bisignano.

Bisignano finally admitted orally his complicity in the crime at about 1:30 P.M. There was then a break in the interrogation process of about two hours. Then, from approximately 3:30 P.M. until approximately 6:30 P.M., Bisignano's oral statement was reduced to writing and signed

by him. He was not permitted to see any visitors until after his written statement was signed.

Bisignano was not taken to a magistrate until March 20, at which time his hearing was postponed to March 28. The hearing was again postponed until April 4, at which time he had already been indicted. See note 1, supra.

On the day following their respective confessions, Russo and Bisignano were taken to the tavern and asked to re-enact their crime, which they did, thereby further incriminating themselves.

The court below made an affirmative finding, well-supported and uncontroverted by the record, that neither Russo nor Bisignano were at any time prior to the signing of their confessions informed that they had a right to remain silent, that they had a right to counsel and that anything they said could be used against them. It appears that it was not until April 4 that the two were informed of their rights.

It should be noted further that Bisignano rested on the transcript of the state court trial at his federal habeas corpus hearing. Russo offered some additional evidence in the way of new evidence in addition to his reliance on the state trial transcript.

## I. Illegal Detention

Russo and Bisignano assert that any confession made during an illegal detention is inadmissible at trial. There is no doubt that the detentions were illegal under New Jersey law, see note 1, supra, and that the Newark police force disregarded the rights secured to an arrested person under the law of New Jersey. The petitioners-appellants press the point that the circumstances under which their

confessions were obtained transgressed the rights secured to them by the Fourteenth Amendment and therefore were inadmissible in evidence. While it is the rule in federal prosecutions that confessions obtained in these circumstances must be suppressed, Mallory v. United States, 354 U. S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957); McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943), this exclusionary rule is a function of the supervisory power of the federal courts over federal prosecutions and does not rise to the dignity of a constitutional prohibition. Culombe v. Connecticut, 367 U. S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); Stroble v. State of California, 343 U. S. 181, 197, 72 S. Ct. 599, 96 L. Ed. 872 (1952); Gallegos v. State of Nebraska, 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951). It follows that this defense asserted by the appellants must fall.

## II. Physical Coercion

Both Russo and Bisignano testified that the confessions were the product of physical beatings and punishment, accompanied by threats of more physical harm. Russo also testified that while at the hospital he was subjected to physical punishment and torturous treatment by the police. Bisignano testified that the police threatened to arrest his wife if he did not confess. The evidence of the petitioners was corroborated to some degree by the statements of various witnesses who testified that they bruises or heard complaints by Russo and Bisignano of police brutality. The police denied all accusations of physical abuse, threats or promises and, in fact, testified that both petitioners cooperated with them in solving the case. The State produced additional testimony to rebut the inferences of physical abuse. It is clear that there was a conflict in the evidence

and that the issue was solely one of credibility. Under these circumstances, we must accept the findings of fact made by the triers of fact, here the New Jersey state court and the court below. Both found no physical coercion and we are bound by that finding. Haynes v. State of Washington, 373 U. S. 503, 515, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Culombe v. Connecticut, 367 U. S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953); Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949); United States ex. rel. Johnson v. Yeager, 327 F. 2d 311 (3 Cir.), cert. denied, New Jersey v. Godfrey, 377 U. S. 977, 984, 84 S. Ct. 1882, 12 L. Ed. 2d 745 (1964); United States ex rel. Smith v. State of New Jersey, 323 F. 2d 146 (3 Cir. 1963), cert. denied, 377 U. S. 1000, 84 S. Ct. 1927, 12 L. Ed. 2d 1049 (1964).

### III. Mental Overbearing

Both petitioners also claim that the length of their detentions, when combined particularly in the case of Russo with his mental condition, rendered the confessions coerced in that they were the products of overborne minds. There is no "litmus-paper test" that a court can look to or apply in order to determine whether a statement, amounting to a confession, was made voluntarily, *i.e.*, that it was the product of a free will. Rather, we must look to all the relevant factors and all must be considered and weighed together. Culombe v. Connecticut, 367 U. S. 568, 601, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961). See Lynumn v. State of Illinois, 372 U. S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963). In the case of Bisignano the factors as they appear on the record show that the questioning was of rather short duration, although conducted in the absence of counsel and with no warning of his constitutional safeguards. However, we

think that within the decisions of this circuit, there is no question that the confession was not coerced. See United States ex rel. Johnson v. Yeager, supra; United States ex rel. Smith v. State of New Jersey, 323 F. 2d 146 (3 Cir. 1963), cert. denied, 377 U. S. 1000, 84 S. Ct. 1927, 12 L. Ed. 2d 1049 (1964); United States ex rel. Smith v. State of New Jersey, 322 F. 2d 810 (3 Cir. 1963), cert. denied, 376 U. S. 928, 84 S. Ct. 678, 11 L. Ed. 2d 623 (1964).

As to Russo, were we confronted only with the police activity at the police station we could conclude without difficulty that Russo's statement there made, the equivalent of a confession, was voluntary. But we have more. There was the questioning of Russo at the hospital, the crucial portion of which was conducted by the two police detectives shortly after the operation had been performed and when he was shackled by his ankle to his bed. Russo admitted, as stated previously, his active participation in the attempted hold up. Interrogation of Russo under the circumstances seems repugnant to concepts of fairness. In addition there is the psychiatric testimony tending to show that Russo was susceptible to suggestions and unable to relate his present actions to future consequences. There is the additional problem that even when he was questioned at the police station Russo was in a weakened condition and his arm was still in a sling. These factors, when combined with the lack of any warning to Russo as to the constitutional safeguards to which he was entitled and his illegal detention could create an inference that the confession was the product of an overborne mind.

On the other hand, however, it is possible to draw the inference that Russo had declined to permit the removal of the bullet from his arm because of his fear that ballistics

tests would prove that bullet had been fired from the revolver of the police officer who was killed at the scene of the crime, thus implicating Russo in the attempted robbery and murder. The further inference can be drawn that after the bullet had been removed Russo gave up all hope of extricating himself from the situation in which he found himself and confessed the attempted robbery. This inference is strengthened by the fact that the confession occurred almost immediately upon Russo's return from the operating room.

On balance, we conclude that this inference outweighs any inference of coercion on these facts.

## IV. Denial of Right to Counsel

Both Russo and Bisignano argue that the failure of the police to warn them of their constitutional right to remain silent, of their constitutional right to counsel and to inform them that anything that they said might be held against them requires that their oral and written statements be excluded and hence necessitates the reversal of the judgments of conviction.[2]

In respect to coerced confessions, the Supreme Court, in recent years, has taken the position that such confessions are excluded not only because they may be unreliable but also because they offend the concept of the accusatory system, an essential part of the fundamental legal philosophy under which this nation was founded. See Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949); see also 112 U. Pa. L. Rev. 394 (1964). "Our decisions under that Amendment [the Fourteenth] have

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[2] Cf. Slovenko, Representation for Indigent Defendants, 33 Tul. L. Rev. 363, 371 (1959).

made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitional system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." Rogers v. Richmond, 365 U. S. 534, 540-541, 81 S. Ct. 735, 739, 5 L. Ed. 2d 760 (1961). Reliance on the accusatory system has introduced into the opinions of the Supreme Court additional safeguards to protect a defendant against the introduction into evidence of possibly coerced statements. See Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). These same concepts have compelled a greater reliance on the presence or absence of counsel as a factor in determining the voluntariness of a confession. Haynes v. State of Washington, 373 U. S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); Lynumn v. State of Illinois, 372 U. S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963); Culombe v. Connecticut, 367 U. S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); Spano v. People of State of New York, 360 U. S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959); Leyra v. Denno, 347 U. S. 556, 74 S. Ct. 716, 98 L. Ed. 948 (1954). See generally, Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings & Legal-Policy Observations, 48 Minn. L. Rev. 1 (1963); Enker & Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47 (1964); Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 Yale L. J. 1000 (1954). In Spano, supra, four Justices would have re-

versed the conviction solely because of the absence of the defendant's counsel at a post-indictment interrogation.

Aside from the expansion of the importance of the aid of counsel for the accused in determining the voluntariness of a confession, the Supreme Court has expanded Sixth Amendment protection[3] as an independent ground for exclusion of a confession or for granting a new trial. In Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the Supreme Court held that a criminal defendant in a state court is entitled to the same right to counsel as a criminal defendant in a court of the United States. Compare Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

The effect of Gideon has been to expand the right to counsel and there has also been a widening of the concept of the stage or stages when that right attaches. We conclude that it is now the law that the right to counsel is present at every critical stage of the proceedings. It has definitely been settled that the right attaches at arraignment where, under state law, that stage is critical as frequently it must be deemed to be. White v. State of Maryland, 373 U. S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963); Hamilton v. State of Alabama, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961); see Pointer v. State of Texas, 380 U. S. 40, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

More recently, in 1964 the Supreme Court, in Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and Massiah v. United States, 377 U. S. 201, 84 S. Ct.

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[3] "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Council for his defence."

1199, 12 L. Ed. 2d [illegible],[4] has held that, under certain circumstances, the right to counsel attaches at the interrogation level. These cases hold that where the right attaches any confession obtained in the absence of counsel must be suppressed independent of any issue of the voluntariness of the confession. In Massiah, the petitioner had already been indicted and was free on bail. Massiah's alleged partner in crime agreed to cooperate with the police. By prearrangement with the police, a radio transmitter was installed in the petitioner's automobile, thereby enabling the police to hear conversations conducted in the car. The partner talked with Massiah in the car and obtained incriminating statements from him. The Supreme Court held that the statements were inadmissible since the police practice offended Massiah's right under the Sixth Amendment to the protection of counsel, relying on the concurring opinions in Spano, supra. The majority opinion treated this surreptitious questioning as an interrogation by the police and held that at this point in the proceedings, *i.e.*, post-indictment, Massiah had the right to the assistance of counsel.

In Escobedo, the Supreme Court extended the right to counsel to a person who had not been indicted or arraigned, but who had been taken into custody and interrogated by the police at the police station. Escobedo had an attorney and had conferred with him a few days prior to his interrogation at the police station. During his detention by the police Escobedo's attorney was present in the building and attempted to speak to his client but was denied access to him by the police. Escobedo also requested per-

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[4] It is to be noted that the court below, when it filed its opinion in the instant cases, did not have the benefit of these two far-reaching decisions of the Supreme Court.

mission to see his counsel, but the police denied that request. The Supreme Court stated: "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment.' * * * and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 378 U. S. at 490-491, 84 S. Ct. at 1765. The Court again stated its holding at 492, 84 S. Ct. at 1766: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

The concern of the Supreme Court in Escobedo was to determine the point at which the right to counsel attached. Not every police interrogation requires the presence of counsel, but when the focus of the investigation shifts from inquiries of a general nature to the investigation of the acts of a particular suspect counsel for the individual subject to the interrogation must be present unless counsel be intelligently waived by the suspect. United States v. Konigsberg, 336 F. 2d 844, 853 (3 Cir.), cert. denied; 379 U. S. 933, 85 S. Ct. 334, 13 L. Ed. 2d 344 (1964). At the time the

confessions of Bisignano and Russo were obtained the focus had shifted. When Bisignano confessed the police already had the statement of LaPierre which implicated both Bisignano and Russo. At the time Russo confessed the police had the confessions of both LaPierre and Bisignano. In addition, when Bisignano and LaPierre confessed the police also had the statement of Veronica Szematowicz which incriminated Bisignano and Russo. Additionally, as to Russo, the police were in possession of a liquor bottle and its carton, both of which contained Russo's fingerprints. The bottle and the container were found in the "getaway" car parked in front of the tavern. If this were not enough, there is also the fact that both Bisignano and Russo fitted the general description given to the police by eye witnesses and Russo had been identified as possibly being one of the two holdup men. We hold on these facts that the focus had shifted from a general inquiry into an unsolved crime to an accusatory process involving Bisignano and Russo.

Nor can it be contended successfully that the questioning process here did not lend itself "to eliciting incriminating statements."

There is, however, a factual distinction between the cases at bar and Escobedo. In Escobedo, there had been a request for counsel; here there was none. Is this factual distinction a tenable ground for distinguishing Escobedo from the cases at bar?

Certainly it is untenable to ground a distinction on the fact that Escobedo had already hired his own attorney while Bisignano and Russo would have required appointed counsel. Such a distinction smacks of denial of equal pro-

tection once it is determined that there is a right to counsel at this stage of the proceedings. Cf. Douglas v. People of State of California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

The distinction, if there be one, must rest on the absence of a request by Bisignano and Russo to have counsel present during the interrogation. But both reason and precedent dictate against such a distinction.

At every other stage of the proceedings at which a right to counsel attaches, the right does not depend on a request for counsel nor can it be presumed that failure to request counsel constitutes a waiver of that right. Carnley v. Cochran, 369 U. S. 506, 513, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); Uveges v. Com. of Pennsylvania, 335 U. S. 437, 69 S. Ct. 184, 93 L. Ed. 127 (1948); Rice v. Olson, 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367 (1945); see also Commonwealth ex rel. Remeriez v. Maroney, 415 Pa. 534, 204 A. 2d 446 (1964); Commonwealth ex rel. Goodfellow v. Rundle, 415 Pa. 528, 204 A. 2d 446 (1964); Commonwealth ex rel. O'Lock v. Rundle, 415 Pa. 515, 204 A. 2d 439 (1964).

We can perceive no sound basis for holding that a request for counsel is a prerequisite for the right to counsel at the interrogation stage while it is not at any other. The test of waiver is the same, or should be, no matter what stage of the proceedings is at issue, so long as the right has attached. In Escobedo the Supreme Court recognizes this principle: "The accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial. See Johnson v. Zerbst, 304 U. S. 458 [58 S. Ct. 1019, 82 L. Ed. 1461]. But no knowing and intelligent waiver of

any constitutional right can be said to have occurred under the circumstances of this case." 378 U. S. at 490, n. 14, 84 S. Ct. at 1765. This language of the Court compels the conclusion stated by Mr. Justice White in his dissenting opinion that the only logical result is to require an intelligent waiver: "Although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel * * * or has asked to consult with counsel in the course of interrogation. * * * At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel." 378 U. S. at 495, 84 S. Ct. at 1767.

No sound reasoning that we can discover will support the conclusion that although at other stages in the proceedings in which the right attaches there must be an intelligent waiver, at the interrogation level a failure to request counsel may be deemed to be a waiver. In reviewing the facts of Escobedo, it is apparent that Escobedo was well informed of his constitutional rights since some days previously he had conferred with counsel and it must be assumed, as the Supreme Court did assume, that counsel had informed Escobedo of his right to remain silent and the effect any statement that he made might have. Yet the Supreme Court held that such prior instructions were inadequate when Escobeo was faced with the incriminating statements of his alleged partner in crime. The Supreme Court held that at that very moment when he was confronted with these statements, he was entitled to the guiding hand of counsel.

The request by Escobedo to consult with his attorney is in and of itself evidence that he was aware of his constitutional rights. Thus, it would seem that to suppress a confession of one knowledgeable of his rights but who has nonetheless confessed and to admit into evidence a confession of one who might be unaware of his rights at the time of his confession would be sophistry. The view that we have expressed here has been well stated by the California Supreme Court: "To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." People v. Dorado, 42 Cal. Rptr. 169, 178, 398 P. 2d 361, 370 (1965), cert. denied, 381 U. S. 937, 85 S. Ct. 1765, 14 L. Ed. 2d 702 (1965). Professors Kamisar and Choper have stated this same rationale in slightly different language: "If the right is deemed sufficiently important to be a due process requirement, why it is not sufficiently important to be made available to the unwary, ignorant and inexperienced as well as to the informed, sophisticated, and professional?" Kamisar & Choper, supra, at 61.[5] "Failure to insist on an intelligent waiver of the right to remain silent inevitably discriminates against the ignorant and inexperienced who may answer questions without any apparent coercion simply because they believe that the police have the authority or power to make them." 78 Harv. L. Rev. 177, 217, 220 (1964). See also Enker & Elsen, supra at 77; 107 U. Pa. L. Rev. 286, 289 (1959).

We find ample judicial authority supporting the view that the right to counsel at the interrogation stage does

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[5] See also Lockhart, Kamisar & Choper, Constitutional Law, 1964 Supp. at p. 39, notes 4-6; Note 19 Rutgers L. Rev. 111 (1964); 53 Cal. L. Rev. 337, 359-61 (1965).

not depend on a request by the person interrogated, although there are decisions to the contrary. In addition to the California decision, Dorado, quoted supra, the Supreme Court of Oregon in a case similar to the case at bar has held that the failure to warn the accused of his right to remain silent requires that the confession be suppressed. State v. Neely, 395 P. 2d 557 (1964). See also Commonwealth v. McCarthy, Mass., 200 N. E. 2d 264 (1964); State v. Dufour, 206 A. 2d 82 (R. I. 1965); State v. Hall, 397 P. 2d 261, 268 (Idaho 1964) (opinion of McQuade, J.); Campbell v. State, 384 S. W. 2d 4 (Tenn. 1964). The appellate courts of Illinois, People v. Hartgraves, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), cert. denied, 85 S. Ct. 1104 (1965); Maryland, Sturgis v. State, 235 Md. 343, 201 A. 2d 681 (1964),[6] and New Jersey, State v. Scanlon, 84 N. J. Super. 427, 202 A. 2d 448 (1964),[7] have, however, held that a request is

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[6] The rule in Maryland is now well-settled. Davis v. State, 236 Md. 389, 204 A. 2d 76 (1964); Henn v. State, 236 Md. 615, 203 A. 2d 899 (1964); Green v. State, 236 Md. 334, 203 A. 2d 870 (1964); Parker v. Warden, 236 Md. 236, 203 A. 2d 418 (1964); Hyde v. Warden, 235 Md. 641, 202 A. 2d 382 (1964); Mefford v. State, 235 Md. 497, 201 A. 2d 824 (1964); Bichell v. State, 235 Md. 395, 201 A. 2d 808 (1964).

[7] The New Jersey Supreme Court has indicated that it will follow this result. State v. Smith, 43 N. J. 67, 202 A. 2d 669 (1964), cert. denied, 379 U. S. 1005; 85 S. Ct. 731, 13 L. Ed. 2d 706 (1965); State v. Vigliano, 43 N. J. 44, 202 A. 2d 657 (1964). See also State v. Johnson, 43 N. J. 572, 206 A. 2d 737 (1965).

Apparently, the Supreme Courts of Virginia, Wansley v. Commonwealth, 205 Va. 412, 137 S. E. 2d 865 (1964), cert. denied, 380 U. S. 922, 85 S. Ct. 920, 13 L. Ed. 2d 806 (1965) and Ohio, McQueen v. Maxwell, 177 Ohio St. 30, 201 N. E. 2d 701 (1964), will also require a request for counsel. Ohio adhered to this position in State v. McLeod, 1 Ohio St. 2d 60, 203 N. E. 2d 349 (1964), a case which was remanded back to it by the Supreme Court, 378 U. S. 582, 84 S. Ct. 1922, 12 L. Ed. 2d 1037 (1964), for reconsideration in light of Massiah.

necessary for the Escobedo rationale to come into play. Accord, People v. Gunner, 15 N. Y. 2d 226, 257 N. Y. S. 2d 924, 205 N. E. 2d 852 (1965); Bean v. State, 398 P. 2d 251 (Nev. 1965); Browne v. State, 24 Wis. 2d 491, 129 N. W. 2d 175, 131 N. W. 2d 169 (1964); cert. denied, 379 U. S. 1004, 85 S. Ct. 730, 13 L. Ed. 2d 706 (1965). The Supreme Court of Pennsylvania, in three recent cases, Commonwealth ex rel. Linde v. Maroney, 416 Pa. 331, 206 A. 2d 288 (1965); Commonwealth ex rel. Storch v. Maroney, 416 Pa. 55, 104 A. 2d 263 (1964) and Commonwealth v. Coyle, 415 Pa. 379, 203 A. 2d 782 (1964), has also taken the view that a request is necessary. However, in the Linde decision, supra, Justice Roberts wrote a separate concurring opinion in which he stated: "While I join in the majority opinion and conclusion, I am not entirely untroubled by the fact that, at least in part, our test turns on a request for counsel. There are some logical problems in making it do so. * * * Among other things, I am somewhat bothered by the fact that a 'request test' may protect only those who know enough to request counsel. Those most likely to know that they should request counsel are persons often in criminal trouble before, perhaps the habitual criminal. Those who are having their first encounter with the law may be much less likely to have either the knowledge or presence of mind to request counsel." However, Justice Roberts was willing "for the present" to concur due to the Supreme Court's frequent references in Escobedo to the " 'circumstances' of that case." Justice Roberts concluded his concurring opinion by noting, "No doubt, we shall have further guidance from the Supreme Court of the United States on this subject. In any event, if the law enforcement officers of this Commonwealth unfailingly advise one upon whom the spotlight of accusation has swung that he has a

right to counsel, then the stress in this area will be substantially lessened." 416 Pa. at 338-339, 206 A. 2d at 292.

While we recognize the split of opinion in the state courts on this issue, we note the reported decisions in the federal courts favorable to the view that we adopt here. Wright v. Dickson, 336 F. 2d 878 (9 Cir. 1964); United States v. Guerra, 334 F. 2d 138, 144 (2 Cir.) (dictum), cert. denied, 379 U. S. 936, 85 S. Ct. 337, 13 L. Ed. 2d 346 (1964); United States ex rel. Rivers v. Myers, 240 F. Supp. 39 (E. D. Pa. 1965); United States ex rel. Dickerson v. Rundle, 238 F. Supp. 218 (E. D. Pa. 1965); Galarza Cruz v. Delgado, 233 F. Supp. 944 (D.P.R. 1964). Contra, United States ex rel. Townsend v. Ogilvie, 334 F. 2d 837 (7 Cir. 1964), cert. denied, 379 U. S. 984, 85 S. Ct. 683, 13 L. Ed. 2d 574 (1965); Mitchell v. Stephens, 232 F. Supp. 497 (E. D. Ark. 1964). In Lee v. United States, 322 F. 2d 770 (5 Cir. 1963), decided prior to the Supreme Court decisions in Massiah and Escobedo, the Court of Appeals for the Fifth Circuit recognized the right to counsel at the post-indictment interrogation stage and held that the right is not lost by the failure to request counsel. Although another panel of the same circuit refused to follow Lee on the broad ground that there was no right to counsel at that stage of the proceeding, Lyles v. Beto, 329 F. 2d 332 (5 Cir. 1964), the Supreme Court has vacated that latter judgment and remanded the case back to the Court of Appeals in light of its decision in Massiah. 379 U. S. 648, 85 S. Ct. 613, 13 L. Ed. 2d 552 (1965).

The Court of Appeals for the District of Columbia has, in dictum, agreed with the result we reach here. Greenwell

v. United States, D. C. Cir., 336 F. 2d 962, 966 (1964).[8] In two later decided cases of that Circuit, the court found the facts to be sufficiently distinguishable from Escobedo and we think that these decisions are not inconsistent with the result we have reached. In Jackson v. United States, D. C. Cir., 337 F. 2d 136 (1964), cert. denied, 380 U. S. 935, 85 S. Ct. 944, 13 L. Ed. 2d 822 (1965), that court held that where the defendant had been specifically told of his right to counsel on at least two separate occasions and had been warned three times of his right to remain silent his admissions and confession were admissible. In Long v. United States, D. C. Cir., 338 F. 2d 549 (1964), the court held that where the defendant confessed immediately upon being approached by the police and before the police could even identify themselves and after the police then informed the defendant of their identity and of the defendant's right to remain silent, he nevertheless, offered further details of the crime, the admissions and confession were admissible.

We can find no effective waiver here. "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Carnley v. Cochran, 369 U. S. 506, 516, 82 S. Ct. 884, 890, 8 L. Ed. 2d 70 (1962). Compare Doughty v. Sacks, 175 Ohio St. 46, 47, 191 N. E. 2d 727 (1963), rev'd per curiam, Doughty v. Maxwell, 376 U. S. 202, 84 S. Ct. 702, 11 L. Ed. 2d 650 (1964). Accordingly, the judgments of the court below must be reversed and the cases will be remanded with directions that writs of habeas corpus issue but without prejudice to the right of the State authorities to try the defendants again on the same charges.

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[8] See also, Queen v. United States, 118 U. S. App. D. C. 262, 335 F. 2d 297 (1964); Ricks v. United States, 118 U. S. App. D. C. 216, 334 F. 2d 964 (1964).

*Opinions of United States Court of Appeals for the Third Circuit (Reported in 351 F. 2d 429—1965)*

On Petition for Rehearing and on Petitions for Leave to Intervene as Amici Curiae

Before KALODNER, Chief Judge, and BIGGS, MCLAUGHLIN, STALEY, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, Circuit Judges.

PER CURIAM.

A petition for rehearing and petitions for leave to intervene as amici curiae, to file a brief and, if rehearing be granted, to participate in oral argument, have been filed in these cases by prosecuting officers and prosecuting officers' associations as set out in the footnote.[1] We entered orders allowing these prosecuting officers and prosecuting officers' associations to file briefs in support of their respective contentions, reserving for future determination the question as to whether or not rehearing should be granted. Extensive briefs have been filed by the prosecuting officers and the prosecuting officers' associations referred to and answering briefs have been filed by counsel for the relators. We note that the brief filed jointly by the District Attorney in and for the City and County of Philadelphia and by the two District Attorneys Associations contains factual ma-

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[1] The petition for rehearing was filed by the County Prosecutor Essex County, New Jersey, by the Assistant Prosecutor, who appeared on behalf of the respondents. The Attorney General of New Jersey has filed a brief entitled "Brief on Rehearing of Amicus Curiae, the State of New Jersey."

Petitioners for leave to intervene as amici curiae, to file a brief, and if rehearing be granted, to participate in oral argument, were filed by the District Attorney in and for the City and County of Philadelphia, by the National District Attorneys Association and by the District Attorneys Association of Pennsylvania.

terial, relating to the issue of the possible retroactivity of our decision, which was not in evidence before the court below, is not part of the records in these cases,[2] and which was called to our attention for the first time on June 1, 1965, when the petition for rehearing was filed by the County Prosecutor of Essex County.

Portions of the briefs filed by the prosecuting officers and by the prosecuting officers' associations are devoted to arguments to demonstrate that our decision, any issue of retroactivity of the application of its principles aside, is erroneous.

As to any issue of the application retroactively of the principles enunciated by our opinion and decision of May 20, 1965, we state that we have considered and weighed carefully the contents of the petitions and their supporting briefs. As has been indicated, the issue of the effect of the retroactive application of the principles enunciated by this court was not before the court below and was raised for the first time before this court by the petitions referred to in note 1, supra.

Our rulings and decision in these cases were considered carefully in the light of the records and the issues which were briefed and argued in the court below and in this court. Consequently we decline, unless directed to do so by higher authority, to pass on the issue of retroactivity so lately raised. The decision of that issue should be deferred to some future and more appropriate occasion, should such arise, when the issue of retroactivity had been raised in the trial court and before this court on appeal from the

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[2] See United States v. Bowles, 331 F. 2d 742, 748-749; Rehearing den. 334 F. 2d 325 (3 Cir. 1964).

trial court and not, for the first time, by way of a petition for rehearing or by means of petitions for intervention as amici curiae as here.

The issues involved in the instant cases are of such importance that they should be put before the reviewing Tribunal as promptly as possible.

Rehearing will be denied.

McLaughlin, Circuit Judge (dissenting).

I dissent from the denial of the petition for rehearing before the court en banc in these appeals.

Escobedo is the governing law. That opinion strictly held that for a statement by an accused to be excluded from being used against him at a criminal trial, the process must be accusatory, its purpose to elicit a confession, "* * * and, under the circumstances here, the accused must be permitted to consult with his lawyer." Escobedo v. State of Illinois, p. 378 U. S. 492, 84 S. Ct. p. 1766. Earlier in the opinion the Court had factually stated that Escobedo had an attorney and had conferred with him about this particular case prior to being interrogated by the police. The Court earlier in the opinion stressed that its narrow holding included as a sine qua non that "* * * the suspect had requested and been denied an opportunity to consult with his lawyer, * * *." Konigsberg meticulously follows Escobedo and does not eliminate the above major requirement as would appear from page 12 of the present opinion.

In view of the above anything else is a minor matter but it should be said that the district judge who saw and heard the witnesses notes that both an electroencephalogram and a neurological examination found Russo to be within normal limits; that he was within the average intelligence

range; that the worst thing that could be mentioned about his mentality was that he "* * * never learned to react to others except in an impulsive and poorly controlled manner with hostility and violence and unmindful of the consequences; * * *." The court specifically holds that neither "* * * Russo or Bisignano was a mentally disturbed person of such low intelligence or capacity as to make him susceptible to police interrogation."

If the Supreme Court desires not merely to widen the Escobedo rule but to strike from it one of its three required elements and so promulgate a new test, that is up to the Supreme Court alone. Without that action an intermediate appellate tribunal has no duty and no right to make such pronouncement. In so doing, proper law enforcement under the Supreme Court mandate is unwarrantably confused, weakened and broken down.

Fairness in crime investigation is no one-way street. A person interrogated with reference to a crime is entitled to full fair play but so is the investigative authority. Due process for law and order—for the public, by proper questioning of suspects has its rightful place under Escobedo. The majority here in its enthusiasm would simply eliminate lawful authority from the equal protection of due process. The destruction of the true balance of criminal justice could well be the net result of the court opinion.

FORMAN, Circuit Judge (concurring).

As a senior judge, I am restricted from voting on the petition for rehearing before the court en banc. Limiting myself to the question of whether the *panel* should grant rehearing, I have concluded that it should not and, therefore, concur in my colleagues' denial of the petition. I am con-

strained, however, to rest on grounds other than those relied upon by the majority.

While the litigants never raised the legal issue of Escobedo's retroactivity prior to filing the petition for rehearing, the relevant facts, namely, the date of the exhaustion of direct appeal remedies by the habeas corpus applicants (June 17, 1963), and the date of the Escobedo decision (June 22, 1964), were before the court and are matters of record. United States v. Bowles, 331 F. 2d 742 (3 Cir. 1964) is not controlling for there the relevant facts were definitely absent from the record. Any other factors bearing on the ultimate determination of the issue are purely legal in nature.

If I had not felt Escobedo to be retroactive, I would not have favored reversal of the District Court. It is not unusual, particularly in the light of the failure of litigants to raise the issue, to apply new constitutional rules to cases finalized before the promulgation of the new rule, without discussion. See Linkletter v. Walker, 381 U. S. 618, 628, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (text and n. 13) (1965). Indeed, we could not have ruled in the manner in which we did unless Escobedo was to be applied retroactively. And Russo and Bisignano should not have been given the benefit of Escobedo unless we were willing to apply it retroactively.

In support of the rehearing, the petitioner and amici themselves rely heavily on Linkletter v. Walker in which the Supreme Court declined to give retroactive effect to Mapp v. State of Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). There is, however, an important distinction between Mapp and Escobedo relative to the question of their retroactivity. In Mapp, the Supreme Court dealt with evidence seized in a search held to be violative of the accused's fourth amendment rights. There was no question

of the reliability of the evidence sought to be introduced subsequent to the illegal search. Mapp thus enunciated a rule limited to deterring unlawful police activity. Linkletter gave emphasis to this factor in rejecting arguments favoring Mapp's retroactivity, Linkletter v. Walker, 381 U. S. at 637, 85 S. Ct. 1731, and the petitioner follows suit herein. At the same time, the Supreme Court announced a standard for measuring when a new constitutional rule should be applied retroactively. The test is: When the repudiated rule could have affected "the fairness of the trial—the very integrity of the fact finding process"—the new constitutional principle is to be applied retroactively. As measured by this standard Escobedo should be applied retroactively. The problems of the administration of justice considered in Mapp may not thwart such application here. See Linkletter v. Walker, 381 U. S. at 637-639, 85 S. Ct. 1731.

The new rule of Escobedo was not one limited to deterring unlawful police activity. To be sure, that was one of the important considerations in announcing the rule. But there were others of at least equal importance. Two critical factors emerge which reflect the underlying policy of the Escobedo rule, namely, (1) the assistance of counsel at the accusatory stage of the proceedings enables the accused to properly exercise his right, and (2) implementing a right to counsel at the accusatory stage assists in the difficult task of resolving the question of coercion where a confession is obtained during a closed interrogation. See Note, The Curious Confusion Surrounding Escobedo v. Illinois, 32 U. Chi. L. Rev. 560, 563-64 (1965) and cases cited therein. When a conviction is sought assisted by the introduction of a confession, failure to apply the Escobedo rule (which now enables an accused to properly exercise his rights at the ac-

cusatory stage of the proceeding and maximizes the ability of the judiciary to rule on the voluntariness of a confession) has the potential to impair the fairness of a trial and to weaken the integrity of the fact finding process.

The petitioner seeks to avoid this result by emphasizing that both the District Court and this court found Russo's and Bisignano's confessions voluntary. That being so, argues the petitioner, their introduction into evidence could not have resulted in an unfair trial or distorted the fact finding process. The petitioner, however, misconceives the Escobedo standard of confession admissibility. We affirmed the District Court's findings of voluntariness by considering the traditional grounds of physical coercion and mental overbearing in the light of the facts available to us. A finding of either would serve as a basis for ruling a confession involuntary and inadmissible. Escobedo, however, made the factor of counsel's non-participation at the accusatory stage of the proceeding another independent basis for confession inadmissibility. This new standard, as is indicated above, in part stemmed from the view that at the accusatory stage of the proceeding the inability to implement one's rights may have a potent effect on the voluntariness of a confession. The difficulty in making a judicial determination of voluntariness, absent counsel's participation at the accusatory stage of the proceeding, heightens the potentiality for undetermined involuntariness. As was indicated in our opinion in the instant case, a greater reliance has been placed on the presence or absence of counsel as a means of determining voluntariness of confessions. Thus, though it could not be said that the traditional standards of voluntariness were violated, based on the record before us, neither could it be said that the potential of an involuntary confession was absent in the light of the policy underlying Escobedo.

The foregoing impels me to the conclusion that rehearing by the panel should be denied, but for my part I would clearly state that Escobedo has been given retroactive effect in these cases.